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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
PETITIONER

V.

PORTLAND TERMINAL COMPANY,
RESPONDENT

BRIEF FOR RESPONDENT

E. SPENCER MILLER,
Attorney for Respondent.

Of Counsel:
ARCHIBALD M. KNOWLES
SUMNER S. CLARK

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No. 336

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

V.

PORTLAND TERMINAL COMPANY, RESPONDENT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the First Circuit is reported at 155 F. 2d 215. The opinion of the District Court is reported at 61 F. Supp. 345.

JURISDICTION

Action was originally brought by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act (c. 676, 52 Stat. 1060); U. S. C. Title 29, Sec. 201 et seq.) in the United States District Court for The District of Maine to restrain respondent from alleged violations, forbidden by Section 6, 11 and 15 of the Act. From final judgment of the aforesaid Court dismissing the cause petitioner appealed to the Circuit Court of Appeals for the First Circuit, which affirmed the judgment of the District Court on April 29, 1946. Petition

for certiorari was filed with this Court under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. 347) which it granted October 14, 1946.

STATEMENT OF THE CASE

By complaint filed in the District Court of the United States for the District of Maine, Southern Division, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff, sought to have Portland Terminal Company, Defendant, enjoined from alleged violations of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act in so far as these sections relate to the payment of minimum wages to and the keeping of records in respect of persons called "trainees" who apply to the Portland Terminal Company for employment as yard brakemen and who are engaged in training in order that they may qualify for such positions. The questions presented to the District Court for decision were the narrow ones of whether "trainees" of Portland Terminal Company are employed by that company within the meaning of the Fair Labor Standards Act and whether such trainees, even if held to be employees, are engaged in commerce or in the production of goods for commerce within the meaning of Section 6 (a) of the Act.

District Judge John A. Peters, before whom the case was tried, dismissed the complaint.

The Plaintiff, hereinafter referred to as the petitioner, appealed to the United States Circuit Court of Appeals on the general ground that the trial judge erred in ruling that trainees for the jobs of brakemen at Defendant's railroad terminal were not employees of the Defendant, hereinafter called respondent, within the meaning of the Fair Labor Standards Act of 1938 during the period when they were learning the duties and functions of the jobs. The Circuit Court affirmed the judgment of

the District Court, deciding as a matter of law that the trainees were not employees of respondent within the scope of the Fair Labor Standards Act. Counsel for respondent on briefs filed both in the District Court and the Circuit Court, contended not only that the trainees were not employees, but also that they were not engaged in commerce. This latter point, though not abandoned, has not been decided, the Circuit Court saying: "Because of the disposition we make of this case, it is unnecessary for us to consider whether these trainees are engaged in interstate commerce." 155 F. 2d 215, 216 (R. 136 Opinion).

It is believed that there should be no substantial dispute as to the facts. Those of importance and pertinence are succinctly summarized by Judge Peters in his opinion, which is set forth in full at the end of this brief and designated APPENDIX A. On the margins opposite each finding appropriate notations referring to the record indicate the evidence upon which the finding or conclusion is based.

Petitioner has sought by consolidating this case with that of Walling v. The Nashville, Chattanooga & St. Louis Ry. in his petition for certiorari to treat the two cases as identical on the facts. He sets forth his version of the facts in the Nashville case at some length and then states (p. 11) that: "Among its (Portland Terminal) employees are yard brakemen who undergo a training period substantially like that given by respondent in the Chattanooga Case....." Since the facts are not identical in the two cases there follows a summary of facts pertinent to establishment of the nature of the relationship between the trainee and the Portland Terminal Company. Each of the following statements is of a fact as found by the trial Court below upon the evidence or as stated in evidence and in no wise refuted by other testimony.

SUMMARY OF FACTS

1. A period of training is necessary to qualify an inexperienced man for the job of yard brakeman. (R. 38, 39 Thomas; R. 87, 88, 89, 90 O'Neil; R. 108, 109 Dykeman; R. 123 Opinion).

2. Satisfactory training must consist both of observation and performance of acts under supervision. (R. 39 Thomas; R. 90 O'Neil; R. 110 Dykeman).

3. For many years prior to the enactment of the Fair Labor Standards Act, Portland Terminal Company and other railroads have engaged in the practice of teaching applicants for jobs. (R. 40 Thomas; R. 108, 109 Dykeman).

4. While being taught, applicants for jobs as yard brakemen are called "trainees." (R. 4 Complaint; R. 15 Amended Answer; R. 123 Opinion).

5. Such applicants have always understood that they would receive no pay while training. (R. 103, 104 Strout; R. 105, 106 Johnson; R. 124 Opinion; Plaintiff's Exhibit No. 7, R. 118, offered R. 33).

6. Trainees have never looked upon themselves as employees. (R. 109 Dykeman).

7. The Company does not consider trainees to be employees. (R. 41 Thomas; R. 125 Opinion).

8. Employees of the Company and the Union representing them do not look upon trainees as fellow-employees. (R. 112 Dykeman; Plaintiff's Exhibit No. 7, R. 118, offered R. 33).

9. Trainees have considered that they were being taught the duties of a yard brakeman in order that they might obtain such a position. (Plaintiff's Exhibit No. 3, R. 114, offered R. 27).

10. A trainee is instructed by the members of a full regular yard crew. (R. 33, 39 Thomas; R. 109, 110, 111 Dykeman).

11. No trainee ever takes the place of a regular member of a yard crew, (R. 39 Thomas; R. 109, 110, 111 Dykeman; R. 123 Opinion) and recollections of a trainee as to working without a full regular crew were demonstrated to be false. (R. 76 Widor; R. 99 Tracey).

12. All acts performed by a trainee are done in the immediate presence of and under the immediate supervision of a member of the regular yard crew. (R. 109, 110, 111 Dykeman).

13. A trainee is always an extra and unnecessary man. (R. 123 Opinion).

14. The trainee does not aid the work of a yard crew but rather impedes it and slows it down. (R. 109 Dykeman; R. 124 Opinion).

15. The length of the training period is not fixed but depends upon the aptitude of the student and averages 7 or 8 days. (R. 39 Thomas; R. 90 O'Neil; R. 102 Quincy; R. 110 Dykeman; R. 124 Opinion).

16. The yard conductor determines when a trainee has qualified, and upon the conductor's certification the trainee's name automatically "goes on the board" among the names of other employees. (R. 30 Thomas; R. 102 Quincy; R. 124 Opinion).

17. Trainees are not subject to rules or discipline applicable to employees. (R. 39, 40 Thomas; R. 85, 86 Haney; R. 112 Dykeman; R. 125 Opinion).

18. Trainees usually remain during a work day with the assigned crew but they are not required to do so and if they do not, they are not penalized, nor are their training privileges terminated. (R. 39, 40, 42 Thomas).

19. Since October 1, 1943, by virtue of a supplemental agreement with the Union representing qualified employees, applicants who have completed their training and become employees are given an allowance of $4.00 a day for time spent training. (Plaintiff's Exhibit No. 7, R. 118, offered R. 33; R. 125 Opinion).

20. Trainees who do not complete training receive no allowance and applicants for training privileges are so notified at time of application. (R. 103 Strout; R. 105, 106 Johnson; R. 125 Opinion).

21. Neither the acts performed by trainees nor the hours spent by them on railroad property are of any immediate advantage to the railroad; they are on the contrary a disadvantage. (R. 39, 42 Thomas; R. 109 Dykeman; R. 123, 124 Opinion).

Upon consideration of all the facts, the District Judge concluded that no employment relationship exists between Portland Terminal Company and those persons being instructed by it and known as trainees. He, therefore, found that no wage obligation arose and that payment to qualified employees of an allowance for "time spent training or failure to make such an allowance was immaterial." These findings were premised upon the ground that the Act does not create new employment relationships or new wage liabilities but regulates such when they exist. Accordingly, the Court ".... finding no violation of law and no reason to apprehend any...." (R. 126 Opinion) caused judgment to be entered dismissing the complaint.

The facts are comprehensively analyzed, together with the findings of the trial Court, in the opinion of Mahoney, J., 155 F. 2d 215 (R. 135-141 Opinion). The decisive point in that opinion is that the activities of the trainees are of primary benefit to them rather than to the railroad. The fact that they exert themselves or suffer a modified control is of no more significance than would be the presence of these elements in the case of an author who for his own benefit and to fit him to write a railroad novel, was allowed to do work on railroad premises. The object of the trainee is to learn an occupation and the object of the railroad is to teach him; it is not the object of the trainee to serve the railroad to the best of his

ability, nor of the railroad to secure the advantage of his service such as it is.

SUMMARY OF THE ARGUMENT

I. TRAINEES OF PORTLAND TERMINAL COMPANY ARE NOT EMPLOYEES WITHIN THE FAIR LABOR STANDARDS ACT.

A. Statutory Definitions of "Employer" and "Employee" are Intended to Describe a Relationship such that an Obligation to pay an Employee exists or is to be implied, and the Congressional History of the Act so indicates.

B. Consideration of the Facts in this Case in the Light of the Purposes of the Act compels a Conclusion that there is no Employment Relationship.

C. Railroad Trainees have been held not Employees under the Fair Labor Standards Act by Every Court which has Passed upon the Question.

II. DECISIONS IN TORT CASES, WHETHER UNDER EMPLOYERS LIABILITY ACTS, OR AT COMMON LAW, HOLDING THAT RAILROAD TRAINEES ARE EMPLOYEES, ARE INAPPLICABLE.

III. SECTION 14 OF THE FAIR LABOR STANDARDS ACT IS APPLICABLE ONLY IN EVENT THAT TRAINEES ARE EMPLOYED.

IV. THE FINDINGS OF THE DISTRICT COURT JUDGE WERE BASED UPON SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

V. TRAINEES OF THE PORTLAND TERMINAL COMPANY ARE NOT ENGAGED IN COMMERCE.

ARGUMENT

I. Trainees of Portland Terminal Company are not Employees within the Fair Labor Standards Act.

Determinative of this case is the answer to be given to the simple question of whether Portland Terminal Company "employs" persons on its premises while learning the duties of a yard brakeman in such a sense that it is compelled by the Fair Labor Standards Act to pay them wages and to keep records in respect of them according to the standards fixed by law. If employment in this situation exists, then the Administrator is clearly entitled to the relief sought. If it does not, the action of the District Judge in dismissing the complaint and refusing the injunction must be upheld. It is necessary to come to the question of whether trainees are engaged in commerce only if it is first concluded that they are employees. It is the purpose of this section of the brief to demonstrate that trainees involved in this action are not employees of the respondent.

A. Statutory Definitions of "Employer" and "Employee" are Intended to Describe a Relationship such that an Obligation to pay an Employee exists or is to be implied, and the Congressional History of the Act so Indicates.

Definitions provided by the Act follow:

Sec. 3 (d)—"'Employer' includes any person acting directly or indirectly in the interests of an employer in relation to an employee. . . ."

Sec. 3 (e)—"'Employee" includes any individual employed by an employer."

Sec. 3 (g)—"'Employ' includes to suffer or permit to work."

It is perfectly apparent that the terms have not been defined in the Act so as to create new or extraordinary concepts or even with sufficient precision to permit of formulation of a hard and fast single test sufficient to try and determine the existence of the employment relationship in many and varied practical business situations. Whether a particular person bears to another the relation of servant, servant of a third person, independent contractor, mere volunteer, licensee, or student, is a matter of judicial determination arrived at by analysis of all of the facts, consideration of their harmony with the conventional idea of what constitutes employment and tempered somewhat by a consideration of the nature of the statute and its purposes.

Since the Act is concerned with the amount of wages payable by employers to employees, it is to be constantly remembered that employment must mean a relationship from which some wage liability would naturally flow either as a result of specific contract or by implication. Thus "employment" for the purposes of interpretation of this Act may be broader or narrower than a common law concept or than a concept of employment arrived at in connection with statutes regulating labor relations, tort liability or child labor. We are here concerned with that kind of employment which carries with it the obligation to pay wages.

The case of *Bowman v. Pace Co.*, 119 F. 2d 858 (C. C. A. 5th, 1941) determined the question of whether a watchman furnished by the Forsythe Detective Agency to Pace Co. was an employee of the latter within the Fair Labor Standards Act. In the course of affirming the decision of the district judge holding that Bowman was not the defendant's employee, the Court said, at Page 860:

"It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage

liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act."

This case is authority for the propositions that the Fair Labor Standards Act is aimed at setting certain wage standards for persons who are bona fide employees of certain classes of employers and that the phrase "to suffer or permit to work" must be read as though the words "under such circumstances that an obligation to pay for the work exists or is to be implied" were added. Indeed, any broader construction would render business men liable for the standard of wages not only of their bona fide employees but also of independent contractors, employees of independent contractors, employees of strangers and mere volunteers; and it would render instructors liable to pay for the work of their pupils. Such would be some of the absurd conclusions logically flowing from upholding the Administrator's contention with respect to the meaning of Sec. 3 (g) of the Act.

It is the position of the Administrator that any person who does work which is suffered by and hence could be prevented by Portland Terminal Company is thereby its employee under the Fair Labor Standards Act. The position of respondent as of all Courts which have decided the precise question, is that the phrase "'Employ' includes to suffer or permit to work" must be read with common sense and with a view to the matters dealt with by the Statute; that Congress cannot have intended to render any owner of business premises liable for wages to all persons whom he suffers or permits to work, regardless of whether the work is of primary benefit to him or for the exclusive benefit of the workers or of third persons. "Manifestly this would encompass

all employed humanity." *Walling v. Sanders, et al.*, 136 F. 2d 78, 81 (C. C. A. 6th, 1943).

Argument of respondent may be epitomized and concretely illustrated by the following. It seems obvious that a person may do work on its premises (1) under the control of and for the immediate benefit of Portland Terminal Company; (2) for another master; (3) for his own exclusive pecuniary benefit; or (4) for his own benefit or pleasure contributing nothing of value to Portland Terminal Company. It is merely a development of the obvious to argue that in the case of (1) the person is an employee of Portland Terminal Company under the Act; that in (2) he is the employee of a stranger and that he cannot look to Portland Terminal Company for wages or the standard thereof; that in (3) he may be an independent contractor and as such is the servant or employee of no one; and that in (4) he may be, for instance, a photographer taking pictures for his own pleasure or benefit, a railroad enthusiast working as a volunteer, for his own edification or pleasure, a prospective author, as suggested by Mahoney, J., (R. 138 Opinion) or, as in the case at bar, a student studying an occupation for his own exclusive benefit.

Nothing could be clearer than that the person in each of the illustrations except (1) is not an employee of Portland Terminal Company under the Fair Labor Standards Act. It is evident that the broad interpretation sought by the Administrator is susceptible of exception in many more instances than in the sole case of a person who is the employee of a third party as suggested by Magruder, J., (see *Schroepfer v. Abell Co.*, 48 F. Supp. 88, holding persons alleged by the plaintiff to be employees under the Fair Labor Standards Act, to be independent contractors) and there are many relationships including the one disclosed by the factual situation

in the case at bar which render the Administrator's interpretation strained beyond the bounds of reasonableness. Such broad interpretation would result for instance in the inclusion within the purview of the Fair Labor Standards Act of persons such as Mr. Turner in the often followed and leading case of *Chicago R. I. & P. Ry. Co. v. Bond, Administrator*, 240 U. S. 449, 36 S. Ct. 403 (1916) who was held to be an independent contractor and as such not entitled to recovery under the Federal Employers Liability Act. If it is asked why Congress chose to define so broadly the word "employ," the answer is ready. "In so broadly defining the word 'employ' Congress undoubtedly had a purpose to relieve complainants of proving a contract of employment." *Walling v. Sanders et al.* (supra) p. 81.

Decisions cited below by petitioner under state child labor or similar statutes, such as *Chattanooga Implement & Mfg. Co. v. Hartland*, 146 Tenn. 85, 239 S. W. 421 (1921), *Curtis & Gartside Co. v. Pigg*, 39 Okla. 31, 134 Pac. 1125 (1913), *People ex. rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N. Y. 25, 121 N. E. 474, (1918), *Purtell v. Philadelphia & Reading Coal & Iron Co.*, 256 Ill. 110, 99 N. E. 899 (1912), *Commonwealth v. Hong*, 261 Mass. 226, 158 N. E. 759 (1927), and *Graham v. Goodwin*, 170 Miss. 896, 156 So. 513 (1934), are wholly inapplicable. These cases hold that statutes defining "employ" so as to include "suffer or permit to work" prohibit work of a minor in the plant, on the premises or in the business of an employer whether there is employment or not. The reason is, of course, that the aim of the statute in each of these cases is to forbid certain acts and occupations to minors whereas we are concerned with a statute not prohibiting performance of acts on industrial premises but setting standards of pay for persons employed. The following excerpt from Page 38 of the Curtis & Gartside Co. case (supra) fully illustrates the distinction:

> "The interdiction is just as strong and positive against permitting or even suffering a child of this age to do such things as it is against employing him to do them. The manifest *purpose of the law is to positively prevent children of this age from doing work of this character* and each of the terms "employed," "permitted" and "suffered" is given a distinct office in the general plan of prohibition." (Emphasis added).

The irrelevance of such citations is fully illuminated by consideration of the Graham case in which the owner of a stave mill was alleged to have infringed the Mississippi Child Labor Act by virtue of the presence on his premises of a minor who was employed by a seller of billets and which minor was injured while delivering billets at the mill. The court found that the mill owner did not employ the minor but suffered him to do work on his premises. Such cases obviously do not hold that suffering or permitting to work is tantamount to employment entailing wage liability.

The case of *Schroepfer v. Abell Co.* 48 F. Supp. 88 (D. Md. 1942) affirmed 138 F. 2d 111 (C. C. A. 4th 1943) involved the question of whether rackmen who sold newspapers through vending machines for which they paid a rental to the newspaper company and which credited them with receipts turned in less the cost of the papers and plus a weekly allowance of $25 for use of car, were employees under the Act and it was held by Chesnut, J. that such rackmen were independent contractors and not employees. At Page 94, the opinion reads:

> "The statutory definitions of 'employer,' 'employee,' and 'employ' are in very general terms, and should be understood 'in their natural sense, and intended to describe the conventional relation of employer and employee.' *Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84..... The definition is too general to expressly solve the particular problem. We must therefore look to the provisions of

> the act as a whole to determine whether such a relationship as existed between the parties to this case constituted the Schroepfers employees of the defendant and thus entitled to the benefits of the Act."

and later, on the same page:

> "The Act thus contemplates (a) a stituation in which the employer, expressly or impliedly, agrees to pay a certain sum to the employee, and (b) has the control and determination of the hours of work by the employee, because by 29 U. S. C. A. 211 (c) it is further provided that the employer must keep written records of the number of hours of work by the employees respectively."

This case is authority for the proposition that some sort of an employment relationship must be entered before liability to pay the standard of wages imposed by the Act can exist. There need be no express or formal contract but the facts must not negative the existence of wage liability. It is interesting to compare the Schroepfer Case (supra) with *National Labor Relations Board v. Hearst*, 322 U. S. 111, 64 S. Ct. 851 (1944), in which case the Supreme Court held that newsboys were employees of a newspaper within the meaning of the Wagner Act. It is evident first that each case must be carefully analyzed on its own facts to support a legal conclusion as to whether a particular person stands in relation to another as independent contractor or employee, and second, that weight will be given to the purposes of the particular act and the subject regulated. Illustrative of this is the following language used by the Court at Page 124 in the Hearst case:

> "Whether, given the intended national uniformity, the term 'employee' includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation."

and

"Congress, on the one hand, was not thinking solely of the immediate technical relation of employer and employee. It had in mind at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the labor dispute. It cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes. Congress had in mind a wider field than the narrow technical relation of 'master and servant' as the common law had worked this out in all its variations and at the same time a narrower one than the entire area of rendering service to others."

Newsboys other than temporary, casual or part time newsboys were found to be an integral part of the publisher's distribution system; they thought of themselves as employees and the newspaper company so regarded them; they worked for the newspaper company and performed services of value to it and their work was supervised by the publisher or its agents. Unquestionably their close economic relationship to the publisher, the permanence of the arrangement and the necessity of bargaining collectively with it, were factors which led the Court to find that they were employees under the Wagner Act. However, the case is readily distinguishable from the Schroepfer Case on many counts but partly because the subject with which the Fair Labor Standards Act is concerned is not collective bargaining but an employment relationship such that wage liabilities arise.

Comparison of these two cases illustrates not only the weight given to the subject regulated by the particular statute but the importance of thorough analysis of facts in each case and the almost controlling weight to be given to the findings of the trial judge or board in the first instance.

Further authority for the propositions that employment within the meaning of the Fair Labor Standards

Act is premised upon a contract express or implied under which wages become due and that "suffer or permit to work" has reference only to work under circumstances involving wage liability is found in the case of *Helena Glendale Ferry Co. v. Walling, Administrator*, 132 F. 2d 616 (C. C. A. 8th 1942). In that case a man named Johnson owned most of the stock in the ferry company and also a plantation upon which he employed a foreman. In addition to his plantation duties, the foreman under Johnson's orders hauled coal and built road approaches for the ferry company. He was paid only by Johnson. Upon these facts the foreman was found to be Johnson's employee and to be not employed by the ferry company within the meaning of the Fair Labor Standards Act even though in a sense it suffered the foreman to do work for it. At Page 620 the Court said:

> "The Act defines an employee as 'any individual employed by an employer' and the word 'employ' as used in the Act includes 'to suffer or permit to work.' But since the obvious purpose of the Act is to establish minimum wages and maximum hours, the words last quoted can not be interpreted to include as an employee one over whose hours of labor the employer has no control, *and to whom the employer is under no obligation to pay wages.*" (Emphasis supplied).

In some respects, even stronger authority for the views herein expressed than the case of Bowman v. Pace Co. (supra) is that of *Walling v. Sanders et al.*, 136 F. 2d 78 (C. C. A. 6th 1943), which involved the question of whether helpers of salesmen employed by a beer distributing concern and which helpers were hired and fired by the salesmen and paid by them were employees of the distributing company. The Court affirmed the finding of the trial judge (48 F. Supp. 9) that the helpers were without the Act, not because they were not engaged in

commerce but rather because they were not the company's employees; and with reference to the Administrator's contention that "suffer or permit to work" created unusually broad employment relationships, the Court said, at Page 81:

> "Since the appellee suffers or permits drivers to work for its salesmen, ipso facto they work for it. This likewise does not follow. In so broadly defining the word 'employ' Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment. The Administrator desires us to construe employees so as to include not only those who work for an accused employer, but also those who work for anyone else. Manifestly this would encompass all employed humanity."

It, of course, can be argued as does Magruder, J. (R. 141 Opinion) that the Bowman, Sanders and Glendale Ferry cases "...:are not controlling, for there the men involved were admittedly employees and the only question was who was their employer?" but that approach is not quite realistic — the real question was whether the defendant was their employer and the tests applied to determine employment by the defendant are concerned with his obligation to pay wages. The language quoted goes far beyond a mere finding of fact that some other person was the true employer. Furthermore the Schroepfer case makes it clear that ability to point to a person other than defendant as employer is not determinative; the principle is applied to rackmen who are found to be employed by no one.

We have already intimated the danger of citing as authorities for the existence or absence of the employment relationship decisions under the common law and under other statutes. It may be in point, however, to cite *Yellow Cab Co. of D. C. v. Magruder, Collector of Internal Revenue*, 49 F. Supp. 605 (D. Md. 1943), involving decision of whether the Cab Company must

pay the federal insurance contribution tax which in turn depends upon determination of whether the drivers of its cabs are employees. The Act which is interpreted is the Social Security Act and the case is relevant here because the tax in question was due only if there was such an employment relationship as to give rise to a liability to pay wages. The Court found that the drivers leased their cabs, that the only monetary consideration passing between the parties was money paid by drivers for rentals of the cabs and, hence, that the relationship was not that of employment but of leasing and hiring and at Page 610, the opinion reads:

> "Counsel for the defendant also seeks to analogize this matter of wages in this case to the Red Cap cases arising under the Fair Labor Standards Act. *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914; *Southern Railway Co. v. Black*, 4 Cir., 127 F. 2d 280; but there is no true analogy here. The tips received by the Red Cap porters in the railway stations were received as a result of their employment by the railroads for a necessary transportation service. The real question was whether the Fair Labor Standards Act was applicable to the situation. The Courts held that it was because the relationship between the parties and the railroads was really that of employment."

Incidentally, these Red Cap cases serve to emphasize the necessity of a more definite connection between the alleged employer and his alleged employee than mere permission to do work. All of the indicia point to employment of the Red Caps by railroads since the railroad often appoints head Red Caps, supervises their hours, dress, etc., instructs them as to meeting sick or disabled passengers, provides equipment for that purpose, and requires them to be stationed about a terminal at particular times and places. Furthermore, and of extreme importance, is the fact that contracts, often express and sometimes

implied, exist between the railroads and Red Caps. It even appears from the words of Mr. Justice Reed at Page 398, of the Williams case, that existence of a contract of employment is essential to that kind of employment from which wage obligations arise and hence are regulated by the Act. These words are:

> "If the redcap did not accept the terms offered, he would be a volunteer and not an employee. As a volunteer he could probably keep his tips, but would not be entitled to a contractual wage. Restatement, Contracts Sec. 55. No such gift of services to the terminal is here claimed."

This interpretation is wholly consistent with the tenor of discussion July 30, 1937, in the Senate, over coverage of the Fair Labor Standards Act, among Senators Black, Copeland, and George (81 Cong. Rec. 7891). Certainly none of those Senators at that time appeared to be under the impression that suffering a redcap to work on railroad premises, and no more, would create, in and of itself, an employment status under the Act.

It is submitted that the foregoing reasoning and authorities conclusively show that the railroad trainee is not within the scope of the Fair Labor Standards Act unless he is an employee because the railroad has contracted to pay wages to him or because an obligation to pay wages is to be implied from the relationship of the parties and from the performance of service of value ordered by the railroad.

B. Consideration of the Facts in this Case in the Light of the Purposes of the Act compels a Conclusion that there is no Employment Relationship.

To determine existence or absence of an employment relationship for the purposes of this case, it is necessary to consider whether:

(1) There is a contract of employment which is express or implied.

(2) Trainees perform work or services of value to the railroad.

(3) Control and discipline are exercised by the railroad in like manner as in respect of admitted employees.

Judge Peters found (R. 124 Opinion) that applicants for training privileges are informed before entering upon the training period that they will receive an allowance for time spent training only if their course of training is completed and they "stay and go to work." The applicant signs a form reading "It is agreed by me to serve for at least two weeks under the instructions of a conductor for the purpose of learning the duties and qualifying for such position, *employment to be subject* of (sic) passing required examinations on the operating rules, the working rules and regulations as from time to time applied, and the approval of the designated officer." (Emphasis supplied). The trial judge also found that the learners are not required to serve the whole two weeks if they can qualify sooner and that aptitude of the individual determines the length of the training period (R. 124 Opinion). From the foregoing, two conclusions are inescapable; the first is that there is no express contract of employment during the training period, and the second is that the agreement completely negatives any kind of employment relationship. The parties have entered into an arrangement inconsistent with a contract of employment express or implied.

It remains to consider whether the attitude of the parties to each other is compatible with an employment relationship. It is clear from the record in this case (as well as from other cases to be cited under I-C) that the custom of training yard brakemen is of long standing both with Portland Terminal Company and

other railroads (R. 40 Thomas) and that neither the trainees while training (R. 109, 110, Dykeman; R. 85, Haney) nor the Terminal Company and its supervisory officers (R. 40, 41, Thomas) ever have considered trainees as employees. Furthermore, the agreement between the railroad and the Brotherhood of Railroad Trainmen (Plaintiff's Exhibit No. 7, Offered R. 33) and set out by the trial judge in his opinion (R. 125) clearly indicates that the Union representing the employees of Portland Terminal Company and bargaining for them, considered that a student brakeman is not an employee and that he becomes such only "... *if and when the student has qualified, is accepted for and takes employment.*" Closely allied to the question of whether employment exists by implication in absence of an express contract of employment and even in face of a contract and attitude impliedly denying employment, is the subject of whether service or work is performed to the benefit of the railroad. The trial Court found (R. 123 Opinion) that "If accepted as such, a trainee is turned over to a yard crew for practical instruction, which is given by affording an opportunity for observation of the routine activities and gradually permitting him to do the actual work under supervision. This is of *no immediate advantage* to the railroad, however, as the trainee does not displace any member of the regular crew at the time. Rather it is a *disadvantage*, because a novice undertakes the work to get experience while a trainman stands by watching him, and the operation is apt to be *impeded* rather than expedited." (Emphasis supplied). Therefore, it is conclusive that there is nothing of value in the service or work, if indeed it can be called such at all, of a trainee which would of itself imply an obligation of compensation. This is one of the important points on which other opinions such as those in the Red Cap cases (supra), *Walling v. American Needlecrafts, Inc.* (infra) and *Walling v. Woodbine Coal Co.*, 64 F. Supp. 82 (E. D. Ky.,

1945) base a finding of employment, and upon which they can be strongly distinguished from the case at bar. The Court below has pointed out that "*In Jewel Ridge Coal Corp. v. Local No.* 6167, 325 U. S. 161, 163-166, 65 S. Ct. 1063 (1945) and *Tennessee Coal, Iron & R. R. Co. v. Muscoda Local No.* 123, 321 U. S. 590, 598, 64 S. Ct. 698 (1944) the Supreme Court set forth the essential elements of work as (1) physical or mental exertion (whether burdensome or not); (2) controlled or required by the employer; and (3) pursued necessarily and primarily for the benefit of the employer and his business." (Of course it is recognized that, as stated by Mr. Justice Jackson (*Armour & Co. v. Wantock*, 323 U. S. at 132-133), these are not the criteria for all cases and that petitioner *might* have actually hired the trainees even though they were to do nothing; still, the absence of some of the mentioned criteria is significant here where employment is denied altogether and any attempt to prove it must be based upon the implications to be drawn from the relationship of the parties). In this case the third element is wholly lacking. No significance can be attached to the probability that some of the trainees will eventually become regular employees and so indirectly benefit the railroad. Portland Terminal brakemen might secure their instruction on other premises and under other supervision, and even have to pay for it, as do stenographers and lawyers employed by a railroad and who have to be trained before becoming employees, or Portland Terminal Company might organize a formal school with instructors paid to teach learners in a special test yard, not used by the Company in its business, in which case tuition might be exacted of and paid by trainees. A Portland Terminal trainee may never become employed by that Company and in fact five (R. 55, Carle, R. 71, Carter, R. 77, Widor, R. 81 Clark, and R. 83, Haney) of the fourteen witnesses called who had trained for positions as yard

brakemen never qualified and never became employed. Magruder, J., in his dissenting opinion, thinks that "It is of no consequence that during their early training period the trainees may be of little immediate benefit—indeed may be a 'disadvantage'—to the Company." He then says that loom operators may at first be an economic liability to the employer but that nevertheless they are employees. Thus comparison is made between the economic disadvantage of textile workers who are admitted to be employees, and whom the textile mill has agreed to pay, and these railroad trainees who are denied to be employees. In the latter situation the furnishing of service of value or the lack of such is an important indication of whether an obligation to pay wages is to be implied; in the textile mill example, since the loom worker is an admitted employee, receiving wages, indicia such as service of value are without significance.

Furthermore, the second element is present in a degree inconsistent with control exercised by an employer over an employee. The trial judge found that "While training, the learner is expected to be present with the crew to which he has been assigned during working hours, but he is not subject to the rules or discipline applicable to an employee and is not considered such. (R. 124, 125 Opinion). This is illustrated by testimony of respondent's superintendent, Mr. Thomas, to the effect that failure of a trainee to report invokes no discipline and he is not forbidden to continue his studies, neither is he reprimanded for errors or omissions (R. 39, 40 Thomas; R. 112 Dykeman). It is apparent that the control and discipline are not those exercised by a master over his servant and are even more mild than the usual degree exercised by a school over its pupils. It is conceded that student brakemen usually remain with the assigned crew during the training period but this is not required nor is it required that a trainee assigned to a crew remain

during the full eight hour shift (R. 42 Thomas). This is entirely consistent with the trainee's status as a student. Since any man must acquire the necessary experience, knowledge and knack of doing things in order to qualify in the eyes of his instructor, it is to *the trainee's advantage* to attend regularly and attentively; otherwise, his training must necessarily take longer. Regular and prompt attendance is customarily expected by schools of their students and for the benefit of the latter. It is necessarily true that a trainee will learn more quickly and be ready for employment earlier if he is present during the yard crew's entire working day. In *Skidmore v. Swift & Co.*, 323 U. S. 134, 65 S. Ct. 161 (1944) the question was whether fire fighters employed by a packing company were employees during a certain period while they were on the property of the employer and on call in the event of fire but otherwise free from duty. The Court said, at Page 163:

> "This involves scrutiny and construction of the agreements between the particular parties, approval of their construction of the working agreement by conduct, consideration of the nature of the service and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged..... The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was."

Applying these criteria there can be no doubt of the correctness of the conclusions of the trial Court. The agreements were clearly to the effect that a trainee is not an employee and that as a trainee he will not be paid. It is difficult to conceive of a state of facts which could more clearly indicate that a trainee is only a student who has been hired neither as a "learner" nor as a regular employee. It would certainly be stretching the statute to an absurd degree to hold that a trainee who thinks

he is a student and not an employee and entered his training with such understanding is nevertheless employed by a company which has for years treated such men as students and not employees, which has informed the applicant for training privileges of his status as a student, and whose superintendent, conductors and brakemen as well as the powerful Brotherhood representing them, have always believed that trainees were not employees and hence not subject to rules, regulations or discipline applicable to such a class.

Petitioner can derive no comfort from *Walling, Administrator* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6th, 1943) or *Fleming, Administrator v. Palmer*, 123 F. 2d 749 (C. C. A. 1st, 1941), for they are clearly distinguishable from this case on at least three vital counts. In the first place, the Act has as a prime purpose the elimination of the sweat shop from American industry. Secondly, work was done for the employer on its order and by its direction, which work was valuable to the employer who had an obligation to pay for it. Thirdly, and of utmost persuasion in indicating a purpose to cover home workers, is Sec. 6 (a) (5) of the Act reading: " if such employee is a home worker in Puerto Rico....." None of these elements is present in this case.

Cases such as Fleming v. Palmer (supra), Cotton v. Ottenheimer, 3 Labor Cases, Par. 60326 (1941), and Walling v. Woodbine Coal Co. (supra), cited by petitioner, are further distinguishable from the case at bar on the ground that the courts found that the arrangement in each of those cases was one aimed at *evasion* of the Fair Labor Standards Act whereas we have seen that the practice of teaching railroad trainees antedates by many years the statute. There is no question of Portland Terminal Company's good faith.

C. Railroad Trainees have been held not Employees under the Fair Labor Standards Act by Every Court which has Passed upon the Question.

From a legal standpoint, the most persuasive reasons for sustaining the decision of the District Court are found in the precedents unanimously in harmony therewith. The questions presented by the instant case, in somewhat varying factual situations, have now been passed upon by seven federal Courts sitting in four different Circuits and the Administrator's contentions have been repudiated by all of them, despite the fact that the Administrator had the advantage of being able to choose his case and the tribunal before whom, in the first instance, it was to be tried. The cases are:

Walling, Administrator v. Jacksonville Terminal Co., 55 F. Supp. 302 (S. D. Fla., 1944);

Walling, Administrator v. Jacksonville Terminal Co., 148 F. 2d 768 (C. C. A. 5th, 1945);

Walling, Administrator v. The Nashville, Chattanooga & St. Louis Railway, 60 F. Supp. 1004 (M. D. Tenn. 1945);

Walling, Administrator v. The Nashville, Chattanooga & St. Louis Railway, 155 F. 2d 1016 (C. C. A. 6th, June 1, 1946);

Walling, Administrator v. Norfolk Southern Railway Company,—F. Supp.—(E. D. No. Car., July 9, 1946);

Walling, Administrator v. Portland Terminal Co., 61 F. Supp. 345 (S. D. Me. 1945);

Walling, Administrator v. Portland Terminal Co., 155 F. 2d 215 (C. C. A. 1st, 1946);

The point was first determined by Judge DeVane in *Walling, Administrator v. Jacksonville Terminal Co.*, 55 F. Supp. 302 (S. D. Fla. 1944), who said, at Page 304:

> "The trainee is not an employee under the commonly accepted meaning of the term, and despite

the language ' suffer or permit to work ' in the Act, 29 U. S. C. A. Sec. 203 (g) he is not an employee thereunder. Congress referred to employment in the Act as the word is commonly used as meaning physical or mental exertion controlled or required by the employer and pursued necessarily or primarily for the employer and his business. The trainee here comes under the head of a student rather than an employee."

The Administrator appealed from the decision of Judge DeVane to the Court of Appeals, Fifth Circuit, and decision of the three judges of that tribunal, Sibley, J. writing the opinion, was handed down April 23, 1945, and is reported 148 F. 2d 768. Commencing at the bottom of Page 769, the opinion reads:

" The Act, Sect. 3 (e) (g), defines ' employee ' as any individual employed by an employer; and ' employ ' as including ' to suffer or permit to work.' The last quoted words do not m an that every one who permits someone to work for a third person *or the worker's own self becomes an employer bound to pay statutory wages.* They mean that one is an employer if he permits another to work *for him*, though he has not expressly hired or employed him. The mere fact that he could have prevented the service does not make him in all cases an employer. A purely voluntary service for which no one intends there shall be pay, is not employment, but a gift. To permit another to work in my shop in making or repairing something for himself, would not make him my employee. The words ' suffer or permit to work ' must be understood with common sense. In the present case the Company did suffer the trainee to work on its premises and with its appliances, *but the benefit immediately in view was to the trainee*, that he might learn, might qualify himself for a job which he desired. While studying the rule book or observing the yards and the crews he was doing nothing to the benefit of the Company. When he was allowed to fire the engine, or throw switches or transmit signals, it was for his instruction. *The Company was*

not benefited, for it had present a man hired to do it who would have done it but for the presence and interference of the trainee. And the parties had formally agreed that what was done was not for the Company, but for the trainee's benefit, and that no pay was expected. The agreement was made in good faith and represented the truth of the relationship. The trainees are not child-laborers, nor economically oppressed persons, nor in danger of injury by substandard living during the short period of training. The regular employees have all been trainees, and are now members of the powerful unions of railroad men, and some of the trainees with railroad experience no doubt are members too. These unions recognize the trainee's status and their contracts with the Company provide for the acceptance of them as employees. No abuse sought to be remedied by the Fair Labor Standards Act appears. We see no occasion to give an unreasonable interpretation to its words to upset this practice, apparently satisfactory to all concerned." (Emphasis supplied).

Certiorari was not sought as a result of the Jacksonville case but three other actions have been undertaken by the Administrator in three other circuits. It is apparent that the Administrator is contending that (1) the Jacksonville decision is wrong; and (2) the other cases justify another result because of differing facts. It is submitted by respondent that (1) the Jacksonville decision is right in law; and (2) that there is no substantial difference between the Jacksonville case and the Portland Terminal case on the facts.

It is not necessary in this part of the brief to devote time to consideration of the opinions below in this case and the Nashville case but it is enlightening to consider the Norfolk Southern Railway Company case, since it is the most recent decision in point. There the Court set forth at length his findings of fact in relation to the arrangement between the railroad and its trainees and then reached a conclusion based thereon, that persons permitted by the Norfolk Southern Railway " . . . . to

enter on its property and on its trains for the purpose of learning to become either firemen or trainmen were not suffered or permitted to work, and were not employees of the defendant, within the meaning of the 'Fair Labor Standards Act';. . . ." This decision is all the more persuasive since it is not based upon citation of the opinions in the other circuits and since the Court had the benefit of not only the majority views of the Circuit Courts in this case (decided April 29, 1946) and the Nashville case (decided June 1, 1946) but also the dissenting opinions of Magruder, J. and Allen, J. Judge Gilliam, like judges in the other circuits, seems to have been impressed with the fact that litigation was not instigated by labor or its organization and that the parties were satisfied with the arrangement for he says: "No complaint of the acts and omissions of the defendant concerning the matters involved in this controversy was made in any quarter prior to the filing of complaint in this case and no complaint has come from any other quarter since such filing."

II. Decisions in Tort Cases, Whether Under Employers Liability Acts, or at Common Law Holding that Railroad Trainees are Employees, are Inapplicable.

Consideration of cases such as *Brown v. Chicago R. I. & P. Ry. Co.*, 315 Mo. 409, 286 S. W. 45 (1926), *Findley v. Coal, etc. R. Co.*, 76 W. Va. 747, 87 S. E. 198 (1915), and *Rief v. Great Northern Ry. Co.*, 126 Minn. 430, 148 N. W. 309 (1914), holding in each instance that the particular railroad trainee is an employee within the Federal Employers Liability Act, and *Atchison, T. & S. F. Ry. Co., v. Fronk*, 74 Kansas 519, 87 Pac. 698 (1906), holding that a railroad trainee is an employee and so entitled to recover under a Kansas statute, indicates conclusively that such decisions have no bearing on the case at bar. In the first place, it is obvious that mere nomenclature does not establish the applicability of

the Fair Labor Standards Act. It is conceded and contended by respondent that circumstances surrounding the relation between trainee and railroad might be such as to constitute a trainee an employee. For instance, if a trainee were hired by contract, performed service valuable to the railroad and for which the railroad was obligated to pay the trainee, there could be no doubt of employment within the Fair Labor Standards Act. It may well be that trainees on one railroad are employed within the meaning of the Act, whereas trainees on another are not. The findings of fact by the trial Court are largely determinative of that.

Secondly, it appears that in every one of the cases cited above under II, the trainee was performing service and work valuable to the railroad. In the Brown case, the student fireman was serving in the cab of a freight train locomotive with the engineer and regular fireman. Whether, as assumed by Magruder, J., (R. 141 Opinion) he was serving as an extra man with a full crew is not certain since it may be that in the case of that railroad, as with those whose operations are familiar to counsel for respondent, a full crew in the locomotive cab of a tonnage freight train consists of three men, two of whom have the duty of shoveling coal, etc.; however, the important point is not whether Brown was an extra man but whether he was present merely to learn or also to perform service of value to the railroad and whether he contributed something in addition to that contributed by the regular fireman. It appears that he did, 315 Mo. at 414:

> "... on the interstate trip in question, deceased helped to fire the engine, ran the stoker, shoveled coal, and helped shake the grates and clean the cinders out of the pan, all under the orders of engineer Kidd and fireman Breitenbucher."

That performance of valuable service by the student fireman is a controlling element in the Brown case is

emphasized by the Court's citation of *Baltimore & Ohio Southwestern Railroad Company v. Burtch, Administratrix*, 263 U. S. 540, 44 S. Ct. 165 (1924). In that case a freight train conductor enlisted the help of a bystander in unloading a very heavy ensilage cutter which the regular crew could not handle without assistance. The Court said, at page 543: "The testimony shows that Burtch was not regularly employed, but that he engaged in this particular work at the request of the train conductor because it was necessary to unload the cutter and the train crew was unable to do so without help." It was the valuable service sought by and performed for the railroad that brought Burtch within the scope of the Federal Employers Liability Act.

In the Findley case, the Court said, at 76 W. Va. 755:

> "The designation of his rank as a student fireman does not imply lack of active duty for the company or service merely for himself as a student. The terms clearly imply practice in the form of *service to his employer* as well as study by observation. His *employment*, his place on the *payroll* of the company implies service"; (Emphasis supplied).

In the Rief case at 126 Minn. 432, the Court found that the trainee:

> ". . . . was expected to perform and did perform such tasks as were assigned to him by the members of the crew in charge of its trains. He helped load and unload freight at way stations, threw switches and did whatever he was ordered to do in the operation of the train."

and in the Fronk case the Court found that the service actually performed was of value to the employer and even went so far as to say (74 Kansas at p. 523): "*The compensation of the Company for the privileges granted to Tindall was the work to be performed by him as freight brakeman.*" It is perfectly clear that men learning how to perform the functions of a certain job on the property of a railroad but at the same time performing

service of no value to the alleged employer are not employees even under the Federal Employers Liability Act. *Bourne v. Southern Ry. Co.*, 225 N. C. 43, 33 S. E. 2d 239 (1945); and see *Fineburg v. Public Service Ry. Co.*, 94 N. J. Law R. 55, 108 Atl. 311 (1919).

Tort cases such as *Huntzicker v. Illinois Cent. R. Co.*, 129 F. 548 (C. C. A. 6th, 1904) thought by Allen, J., to be contravened by the majority opinion in the Nashville case; *Millsaps v. Louisville, New Orleans & Texas Ry. Co.*, 69 Miss. 423, 13 So. 696 (1891), and *Lasser v. Southern Pacific Ry. Co.*, 148 Cal. 426, 83 Pac. 439 (1906) holding that the particular trainee in each instance was an employee at common law, are even less in point than tort cases under statutes. Not only does it appear that the particular trainee was engaged in service of value to the company but it is further apparent that the fellow servant rule which is involved in each of these cases rests upon association between a servant and other servants of the same master rather than upon employment such that an obligation to pay wages arises. This fundamental principle is recognized by the Court in the Huntzicker case, which says, at Page 550:

> "Probably the service was not of much value but such as it was it necessarily brought him into association and co-operation with the other servants employed in moving the trains. The rule applicable to the relation of fellow servants rests upon the idea of such voluntary association and co-operation and the assumption of the risk arising therefrom."

and

> "There are cases which hold that it is not even necessary that one volunteering to assist the servants of their employer should have the expectation of reward, if he has no interest in having the thing done, in order to constitute him a fellow servant. These cases go upon the ground that the party joined the servants and was doing what he did in the assumed relation of a servant and consequently took the risk of the negligence of his fellow servants."

The decision in the Millsaps case rests on the English case of *Degg v. Midland Ry. Co.*, 1 Hurls & Norm. (Ex.) 773, holding that a mere bystander who volunteered to assist the Company's servants in moving a turntable and was injured by their negligence cannot recover under the fellow servant rule and upon *Barstow v. Old Colony R. Co.* 143 Mass. 535, 10 N. E. 255 (1887), which holds that a mere volunteer, in no sense an employee of the railroad, learning telegraphy, if injured, while voluntarily running an errand, by negligence of the railway's servants, is barred from recovery. Nothing could more forcibly indicate the inapplicability of such cases.

Of course the answer to all tort cases, whether at common law or under statutes, is that tests establishing such an employment relationship that liability of the master ensues either for torts committed by the alleged servant or to him, or establishing such a relationship that the fellow servant rule bars recovery from the master, may and often do, fail to establish employment in the sense that the alleged employer is obligated to pay wages. Reading the opinion in the Brown case and the authorities cited on pages 415, 416 and 417 leaves no doubt that the Court was considering "employment" from the standpoint of tort and not wage liability, emphasizing, as National Labor Relations Board v. Hearst Publications (supra) emphasizes, that "employment" must be read with the subject matter regulated uppermost in mind and that wage liability and tort liability are not necessarily coincident. That the Missouri Court in the Brown case was thinking in terms of tort liability and even applying common law concepts is seen from these words on Page 416:

> "If a third person had been injured through Brown's negligent performance of the duties assigned to him, there can be no question that appellant would have been liable for Brown's negligent acts

although he received no pecuniary compensation for the performance of those duties."

Supporting our contention are the words of the Court in *Walling v. Jacksonville Terminal Co.*, 148 F. 2d at 771:

> "Similarly the many cases cited as to the liability in tort for personal injuries suffered by persons in training are far afield. The varying duties and degrees of care to be observed for the safety of persons exposed to danger are not the touchstones for this Act, which relates only to the wages to be paid to employees. We repeat what we said in Bowman v. Pace, supra (119 F 2d 861) that 'wages are due according to principles of contract, not of tort.'"

In this connection Judge Strum in Walling v. The Nashville, Chattanooga & St. Louis Railway (supra) said:

> "For the purpose of this Act whether or not the relationship of employer and employee exists is to be determined upon principles of contract. Tort cases relating to that relationship are inapplicable."

In Yellow Cab Co. of D. C. v. Magruder (supra) at Page 607, the Court said:

> "Many decided cases on generally similar factual situations have very properly held a cab company such as the plaintiff in this case, to liability to the public, even when the real relationship between it and the drivers of its cabs is not that of employer and employee, or master and servant."

In Bowman v. Pace Co. (supra) at Page 861, we find:

> "But it is argued that Bowman was so far under the orders of the Pace Company as that Forsythe was not an independent contractor, citing especially 39 C. J. Master and Servant, p. 38; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 S. Ct. 175, 33 L. Ed. 440, and *Western Express Co. v. Smeltzer*, 6 Cir., 88 F. 2d 90, 112 A. L. R. 74. These cases and those cited

by C. J. relate to liability for personal injury to members of the public or to the workers, and not to a liability to pay wages. If one has full direction over the conduct of his business done by another, it is just to hold him responsible to any person who has been injured by a misconduct of the business; but it does not follow at all that the liability for wages is thereby shifted. Wages are due according to principles of contract, not of tort. See 2 Labatt, Master and Servant, 2d Ed. §§665, 680."

III. Section 14 of the Fair Labor Standards Act is Applicable only in Event that Learners are Employed.

That portion of Section 14 of the Act applicable to this discussion reads:

> "The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the *employment* of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under Section 6 and subject to such limitations as to time, number, proportion and length of service as the Administrator shall prescribe, ..." (Emphasis supplied).

Petitioner is in the position of claiming that this section means that all industrial learners are ipso facto employees. It seems clear, however, that this view just reverses the proper sequence. First an arrangement of employment must be entered into. A student does not become an employee simply by undertaking to learn an occupation on the premises of a business. Section 14 applies *if* a learner has in fact become an employee and not otherwise. Learners may be employed or they may not be employed and Section 14 applies exclusively to the former situation.

It is to be borne in mind that in the ordinary and well recognized case of an apprenticeship the apprentice is just as much an employee as the most highly skilled workman. The apprentice unquestionably works and his master unquestionably gets the benefit of what he does. The lower quality of his work and the fact that he is getting a peculiar benefit from his experience are customarily taken into account in the scale of wages paid but he is none the less an employee. A person such as the trainee in this case who receives no remuneration, produces nothing of benefit to the railroad, does only practice work and in performing any acts does so with a qualified employee present who could do the same thing, is being paid to do it and stands by idly while the trainee does it to train himself, is not an apprentice as that term has always been understood. The possibility of a future benefit to the railroad dependent upon eventual qualification of the trainee is unimportant. If a railroad should tell a young man that it would employ him as a rod and chain man if he completed a course of training at a school of civil engineering, no one would think of claiming that the young man was employed while going to school. The very voluminous Congressional history of the Act has been studied to ascertain whether any consideration was given to learners who were not employed and it is significant that no single indication has been found that any person in Congress or testifying before committees entertained the idea of application of the Act to learners who were not employed in the usual sense, who did not contribute to the extent of their ability to the business of the employer and who received no compensation whatever. It is true as stated by Magruder, J. (R. 142 Opinion) that Congress refused to grant employers a six months exemption, recommended by Mr. Taylor with respect to *employment* of learners and apprentices, from the minimum wage provisions of the Act and provided instead machinery for *employment* of

learners at rates to be fixed by the Administrator. However, one may search the Congressional Record in vain for any manifestation of intention to embrace by virtue of Section 14 learners who would not be employees except for the provisions of that section (83 Cong. Rec. 7389, 7391, 7393) or to limit opportunities for studying industrial occupations to persons who are employees or to impose upon all industrial learners an employee status as a matter of law. Certainly the understanding of Mr. Justice Jackson (then Assistant Attorney General) as indicated by his statements set forth on pages 26, 27 and 28 of brief of amicus curiae in opposition to granting of certiorari in this case, appears to have been that learners were apprentices hired by an employer. Petitioner must prove by reference to either (1) the literal wording of Section 14 or (2) the Congressional history of the Act, that all learners on industrial premises, whether or not employed in the sense that they could ordinarily expect remuneration are covered by the Act. The literal meaning of the words of Section 14, i. e., ".... the employment of learners....." refutes the contention of the Administrator, who has the burden of proof in an attempt to sustain his argument that Congress intended Section 14 to embrace all industrial learners; and who has been totally unable to point to a single statement by anyone in Congress indicating that all students of industrial occupations who are permitted to secure instruction on industrial premises are conclusively presumed to be employed or that Section 14 has that far-reaching purpose.

Sibley, J., in Walling v. Jacksonville Terminal Co. (supra) disposed of the Administrator's contention thus:

> "And it is urged that Section 14 of the Act condemns this training plan unless under a special certificate and with wages specially fixed by the Administrator for learners. We do not construe Section 14 as aimed at curtailment of teaching the

industrial arts, but rather at helping learners and other handicapped persons who could not command for their services the full wages fixed by the Act, to get them employment at less wages rather than no employment at all. The section lays a duty on the Administrator to provide for such persons. But its provisions apply only to the 'employment' of learners and the 'employment' of handicapped persons. If any person is willing to use such employees in his business, that is, to employ them he must obtain a certificate and a lower wage fixed by the Administrator in order to escape the demands of the Act. But if he is not *employing* learners, but is in good faith endeavoring merely to *teach* them, the section does not apply for no wages at all are due." (Emphasis supplied).

At the end of his opinion in the Nashville case Judge Strum says:

"Nor are these trainees 'learners' as contempleted by the Act. A 'learner' is an employee who labors in the interest and for the benefit of his employer, and who produces something, or performs a service in the employer's interest, but due to inexperience or some other handicap the product of his labor is inferior to that of an experienced worker. The point of cleavage is that the 'learner' though his product be inferior or limited, is nevertheless working for the benefit of his employer and contributing to the employer's interest as far as the learner's capabilities permit, while the trainees here involved are working solely for themselves. The company gains no measurable benefit from their activities."

A simple example will serve to show that the Terminal Company's trainees are not suffered or permitted to work within the meaning of Section 3 (g) and even more clearly the manifest inapplicability of Section 14. Let us suppose that Portland Terminal Company, which owns and occupies several yards with tracks, switches and the usual facilities, should advertise in the Portland papers that commencing on a day certain Yard No. 9 would be

devoted to the training of any persons who desired to learn the duties of a railroad yard brakeman, and who could pass certain physical fitness tests; that qualified instructors would be present, furnished and paid by the Terminal Company; that the hours of training subject to the supervision and teaching of such instructors would be from 8 A. M. to 5 P. M. with an hour for lunch between 12 Noon and 1 P. M.; that the tuition would be $25 for a course to last until the trainee became qualified in the eyes of the instructor and in no event more than 14 days; that upon certification of qualification, the trainee's name would automatically "go on the board" and he would take his place and seniority among the railroad's yard brakemen; and that if he did so qualify he would be paid $4 a day for each 8-hour day spent training. Let us further suppose that this program was carried out by use of obsolete cars and engines in Yard 9, which is a storage and not an operating yard, and that the cars, engines, switches, etc., were operated for instruction purposes only and without reference to the normal business of the railroad. Let it be further supposed that the high wages and unusual social security known to be enjoyed by railroad trainmen induced Mr. Carle, a carpenter (R. 55), Mr. Carter, a laundry worker (R. 68), Mr. Widor, a storekeeper (R. 77) and Mr. Clark, a biscuit company employee (R. 79), to train a few days in an attempt to better their eventual earning power. Under such circumstances, a claim for wages as fixed by the Fair Labor Standards Act would verge on the ridiculous; and yet the Terminal Company would be suffering the trainees to work and they would be learning an industrial art on its premises, and applying the tests referred to by Mahoney, J., 155 F. 2d 215, 219 (R. 140 Opinion), there would be (1) physical and mental exertion, (2) a modified control by the Terminal Company, but (3) the work would not be pursued necessarily and primarily for the benefit of the latter. It thus appears that the

third factor is decisive. Absence of benefit to the alleged employer, in this case, destroys any implication that wages are due. Such absence is as clear in the facts on this record as in the example just set forth and upon analysis there is no fundamental difference between the two. Whether instruction be given with reference to movements of trains in a test yard or in an actual operating yard has no significance *provided that instruction and not work of benefit to the railroad is the purpose of the parties*. Practically, the trainee is better off financially and in every way under the actual practice than he would be in the circumstances of the given example.

It cannot be contended that the instruction given to trainees is a subterfuge whereby Portland Terminal avoids paying for service or work of value since the presence of the trainee is a disadvantage to the railroad (R. 123, 124, Opinion). For that reason, *Cotton v. Ottenheimer*, 3 Labor Cases, Par. 60326 (1941), is wholly inapplicable.

IV. The Findings of Fact of the District Court Judge Were Based Upon Substantial Evidence and Should be Affirmed.

Bound with this brief, as an appendix thereto, is the opinion of the Court written by Judge Peters. Opposite each and every finding is a marginal note citing supporting record references. It is thus conclusively proved that these findings of fact are thoroughly supported and indeed it is not understood that petitioner claims that any of them is unsupported or erroneous. It is too firmly settled that " Findings of fact shall not be set aside unless clearly erroneous. . . ." to permit of argument. See Rule 52 of Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723c; *Sundt v. Turman Oil Co.*, 107 F. 2d 762 (C. C. A. 5th, 1939), and cases therein cited, at Page 764.

Of greater significance is the very clear tendency of courts of appeal to uphold conclusions of a trial judge even

where such conclusions are at least partly legal, since they are based upon subsidiary findings and the inferences to be drawn from the testimony which he heard. In the case of *Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590, 64 S. Ct. 698 (1944), the trial court reached a conclusion that travel underground to place of work was part of the work week of miners of iron ore, which conclusion was based upon detailed subsidiary findings of fact in much the same manner as Judge Peters' conclusion of lack of employment in the case at bar was based upon his detailed findings of fact. It is plain that respect for the conclusions of the tribunal which heard and weighed the evidence impelled Mr. Justice Frankfurter and Mr. Justice Jackson to concur. The former said, at 321 U. S. 604:

> "An administrative agency for preliminary adjudication of issues arising under the Wages and Hours Law, like that established by the National Labor Relations Act, was not provided by Congress. And so, the application of this colloquial concept 'work-week' to the multifarious situations in American industry was left by Congress for ascertainment by judicial proceedings. These facts are to be found either by a jury or, as in this case, by a judge sitting without a jury. And so here it was the judge's duty to determine what time and energy on the part of the employees involved in this suit constituted a 'work week' of these employees of the petitioners. After a trial which lasted for about three weeks, during which testimony covering 2,643 pages was heard and voluminous exhibits were introduced, the District Court made its findings of fact. A judgment for the employees based on these findings was affirmed by the Circuit Court of Appeals. 40 F. Supp. 4; 135 F. 2d 320.
>
> "We have then a judgment of two courts based on findings with ample evidence to warrant such findings. Affirmance by this Court is therefore demanded."

Mr. Justice Jackson, at Page 605, upheld the conclusions of the trial court in these words:

> "After hearing a mass of conflicting testimony the trial court said of these activities, 'They are performed on the premises of the employer, in the furtherance of the employer's business, with no benefit to the employee (except to aid him in the performance of work for the employer), under conditions created and controlled by the employer, and they involve responsibility to the employer and physical exertion, even though not burdensome, on the part of the employee. No characteristic of work is lacking.' These were found to be the facts by the two courts below and, whatever we might decide if we were a trial court hearing the evidence in the first instance, we cannot with our limited review hold them wrong on this record."

On the same page this very strong statement is made on the general proposition: "A seasoned and wise rule of this Court makes concurrent findings of two Courts below final here in the absence of very exceptional showing of error."

In *Jewel Ridge Coal Corporation v. Local No.* 6167, 325 U. S. 161, 65 S. Ct. 1063 (1945) in which the conclusions of the two Courts below were opposite, four members of the Supreme Court would have held that bituminous coal miners were not employed during underground travel to place of work, partly because of conclusions and findings of the trial judge differing from those of the trial judge in the Muscoda case. Further indication of the importance attached to the conclusions of the fact-finding body is seen by the language of the Court in *N. L. R. Board vs. Hearst*, 322 U. S. 111 at 130, 64 S. Ct. 851 (1944), at 860 where Mr. Justice Rutledge in delivering the opinion of Court says:

> "In making that body's determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate

conclusions, it is not the court's function to substitute its own inferences of fact for the Board's when the latter have support in the record. *Labor Board v. Nevada Copper Corp.*, 316 U. S. 105; cf. *Walker v. Altmeyer*, 137 F. 2d 531 (C. C. A.). Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294; *United States v. American Trucking Assns.*, 310 U. S. 534. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a 'member of a crew' (*South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251) or that he was injured 'in the course of employment' (*Parker v. Motor Boat Sales*, 314 U. S. 244) and the Federal Communications Commission's determination that one company is under the 'control' of another (*Rochester Telephone Corp. v. United States*, 307 U. S. 125), the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."

Thus is stated a principle of law not to be invoked to sustain findings and legal conclusions in favor of a government agency or bureau and to be laid to rest when application is sought by a private defendant; so in this case, the determination of Judge Peters is to be accepted if it has "warrant in the record and a reasonable basis in law." The presence of those elements is susceptible of no reasonable doubt. Adverting to the case of *Skidmore v. Swift & Co.* (supra) and paraphrasing the words of Mr. Justice Jackson, at 65 S. Ct., 163, the trial judge was bound to give scrutiny and construction to the arrangement between the parties, appraisal of their

practical construction of the arrangement, and consideration of the nature of the "work" necessarily involving determination of whether the arrangement was one of instructor and pupil or one of employer and employee. Facts might have shown that the trainee was learning in order that he might be employed or that he was employed while learning. The law did not impose an arrangement upon the parties but it did impose upon the trial Court the task of finding what the arrangement was. The trial Court has discharged its function and has not decided that railroad trainees are, as a matter of law, not employees but has found that the trainees of Portland Terminal Company in the factual situations disclosed are not its employees in the commonly accepted meaning of the term nor as the term is used in the Act (R. 126 Opinion). It is clear that this finding must be allowed to stand as final unless it is ruled as a matter of law that any and all persons suffered by a business proprietor to enter upon his premises to learn an occupation must ipso facto become his employees. If there are exceptions in which a trainee or learner may not be an employee, then the findings of the trial Court are conclusive.

V. Trainees of the Portland Terminal Company Are Not Engaged in Commerce.

We announced at the outset that a decision of this court upholding the trial Court's conclusion that the trainees are not employees, settles the entire issue. On the other hand, the Administrator would not even under a contrary conclusion be entitled to an injunction under Sec. 15 (a) (2) of the Act for the purpose of preventing an alleged violation of Secton 6 without a showing that the trainees of Portland Terminal Company are "..... engaged in commerce or in the production of goods for commerce."

It is granted that respondent is engaged in interstate commerce but that is not the determining factor. The

question is whether the trainee is engaged in that commerce and, as we shall see, that depends upon whether he does work necessary to such commerce. There can be no question since the decision of *McLeod v. Threlkeld*, 319 U. S. 491, 6 3S. Ct. 1248 (1943), that the phrase "in commerce" is to be construed much more narrowly than "production of goods for commerce." (See Davisson, "Coverage of the Fair Labor Standards Act," 43 Mich. L. Rev. 867 (1945). This Court, in the case of *Armour & Co. v. Wantock, et al.*, 323 U. S. 126, 65 S. Ct. 165 (1944), at Page 167-8, has said:

> "McLeod v. Threlkeld .... which did exclude the employee from the scope of the Act is not in point here because it involved application of the other clause of the Act, covering employees engaged 'in commerce,' and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce."

In the McLeod case, the Court points out that in connection with Sections 6 and 7 of the Act, Congress rejected the phrase "engaged in commerce in any industry affecting commerce" in favor of the words now in the Act. The facts of the McLeod case are not parallel to those of the case at bar but certain language is quite illuminating. For instance, at Page 1251, Mr. Justice Reed says:

> "The test under this present Act, to determine whether an employee is engaged in commerce is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement so far as they are covered by wage-hour regulation are governed by the other phrase 'production of goods for commerce.'"

If we apply this test to the trainee, what is the inevitable conclusion? First, there is no evidence on the

record that the trainee's activities in any way aid the work of the Terminal Company or its employees; on the contrary, it is found that they retard the work and constitute a detriment. Indeed, since the trainee's functions are limited to observation and certain acts done under direct and personal instruction and supervision of an employee, it is questionable if the trainee does any "work" at all. In any event, it is clear that his presence and acts do not aid the commerce of the defendant.

The remarks of Mr. Justice Murphy in dissenting to the majority opinion of the McLeod case, make it clear that employees not essential to the carrying on of interstate commerce are without the Act. At Page 1254, he says:

> "The phrase 'engaged in commerce' should be broadly construed. In the words of one of the Act's sponsors the phrase extends to 'employees who are a *necessary part* of carrying on' a business operating in interstate commerce." (Emphasis supplied).

He further interprets the majority decision:

> "The effect of the Court's decision today, however, is to recognize that federal power over commerce has been sweepingly exercised when an employee's work is in the production of goods for commerce, but to limit it when the employee's activities are in transportation or connected therewith, to the narrow and legislatively repudiated view of the Shanks, Bolle, Commission and Bezue cases."

Since the respondent is engaged in commerce and not in the production of goods for commerce, it follows from Mr. Justice Murphy's interpretation of the decision that any person, employee or otherwise, not essential to commerce is not within the scope of the Act. Even if the Act were interpreted to extend coverage to "employees who are a necessary part of carrying on . . ." a business, these trainees, in no sense necessary or helpful to respondent in performance of its functions would still be without

the provisions of Section 6 of the Act. The conclusion is irresistible that a "trainee" regardless of his technical employment status is not essential to commerce for he is a student no part of whose duties are in furtherance of commerce and therefore that the Act does not fix minimum wage standards for him.

The point is that a student watching employees engaged in commerce doing certain acts and who himself does some unnecessary acts under supervision, plays no part in that commerce which would be better expedited without him. In the case of the trainee it is not so much that his work does not affect commerce but that he performs no work or service of value. He is just as non-essential to the business of respondent as he would be if he were training in a test yard and divorced from all contact with railroad operations.

It was unnecessary in the original case of Walling v. Jacksonville Terminal Co. (supra) to consider at length whether a trainee even if an employee was engaged in commerce. However, this point was not overlooked and in connection with it, Judge DeVane made the following statement:

> "Only those employees of defendant who are a necessary part of carrying on its business in interstate commerce are covered by the Act."

And in the case of *New Mexico Public Service Co. v. Engel*, 145 F. 2d 636 (C. C. A. 10th, 1944), at 638, the Court said:

> "It is now established beyond controversy that to be engaged in commerce within the meaning of that phrase an employee must be actually engaged in the movement of commerce, or the services he performs must be so closely related thereto as to be for all practical purposes an essential part thereof. *McLeod v. Threlkeld*, 319 U. S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538; *Rucker v. First National Bank*, 10 Cir., 138 F. 2d 699 and *Clyde v. Broderick*, 10 Cir., 144 F. 2d 348. And in that connection *closeness depends*

upon the essentiality and indispensability of the particular work or services performed to the actual movement of commerce. Overstreet v. North Shore Corp. 318 U. S. 125, 63 S. Ct. 494, 87 L. Ed. 656; *Pederson v. Del. Lack. & West. R. R.*, 229 U. S. 146; 33 S. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; *United States v. Darby*, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609, 132 A. L. R. 1430. If a cessation of the services of the employee causes an interruption or interference, with the free movement of commerce, it is ordinarily regarded as an essential and indispensable part thereof." (Emphasis supplied).

Can it be seriously contended upon the record in this case that cessation of activity by a trainee would cause interruption of or interference in the free movement of commerce? Since he is a non-essential and extra man who does not aid but rather hinders the full regular crew always on the job, the answer is obvious and inevitable.

CONCLUSION.

Respondent contends that the following propositions are conclusively established:

I. The findings of fact of the trial Court were fully supported by the evidence; he did not err as a matter of law in concluding from his findings that trainees are not employees of the Portland Terminal Company within the scope of the Fair Labor Standards Act, and his decree must stand.

II. Trainees of Portland Terminal Company are not essential to the commerce engaged in by that company nor a necessary part of carrying on its business and hence are not engaged in commerce within the meaning of Section 6 of the Act.

The decree of the Court below should be affirmed.

E. SPENCER MILLER,
Attorney for Respondent.

Of Counsel:

ARCHIBALD M. KNOWLES.
SUMNER S. CLARK.

APPENDIX A.

DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF MAINE
(SOUTHERN DIVISION)

L. METCALFE WALLING, ADMINISTRATOR, WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR,
PLAINTIFF

VS.

PORTLAND TERMINAL COMPANY,
DEFENDANT

OPINION OF THE COURT

18TH JUNE, 1945.

PETERS, Judge: In this action the plaintiff seeks to have the defendant enjoined from violating the sections of the Fair Labor Standards Act relating to the payment of minimum wages and the keeping of records; Sections 15 (a) (2) and 15 (a) (5).

The defendant denies the applicability of the statute in the situation disclosed. The principal question raised involves the employment status of certain applicants for positions who are being trained by the defendant preparatory to regular employment as trainmen, in case they qualify. If, on the evidence, they should not be considered as employees, as the term is used in the Act, the plaintiff is not entitled to the injunctive relief asked for.

Record References and Name of Witness supporting each Finding of Fact.

Findings of Fact.

The defendant is a common carrier by railroad employing yard crews in the operation of its terminal facilities

R. 30, 24 Thomas

R. 38, 39 Thomas
R. 87-90 O'Neil
R. 108, 109 Dykeman

at Portland. Applicants for such positions have to be taught how to do the work. They are called "trainees" or "learners." If accepted as such, a trainee is turned over to a yard crew for practical instruction, which is given by affording an opportunity for observation of the routine activities and gradually permitting him to do the actual work under supervision. This is of no immediate advantage to the Railroad however, as the trainee does not displace any member of the regular crew at the time. Rather, it is a disadvantage, because a novice undertakes the work to get experience while a trainman stands by watching him, and the operation is apt to be impeded rather than expedited. If the trainee finishes training and is certified as fit for a position as trainman his name goes "on the board," as ready for work, and he receives an allowance of $4.00 a day for his training period based on an eight-hour day. If he does not finish training or is not certified as competent he receives nothing. Thus the Railroad obtains a pool of qualified workmen to draw upon and the worker is in line for a job.

R. 39 Thomas
R. 64, 65 Morgan
R. 87, 88 O'Neil
R. 105 Johnson
R. 109 Dykeman

R. 33, 39 Thomas
R. 109, 110, 111 Dykeman

R. 107 Johnson.
R. 30, 31 Thomas
R. 103 Strout
R. 105, 106 Johnson
Exhibit No. 5, R.116, Offered R.29
Exhibit No. 7, R.118, Offered R.33

R. 30 Thomas

Inexperienced applicants for employment are informed before entering upon the training period that they will receive the allowance only if they "stay and go to work." That is, if they complete the training period and are certified as qualified for employment.

R. 85 Haney
R. 103 Strout
R. 105, 106 Johnson

R. 39 Thomas
R. 90 O'Neil
R. 102 Quincy
R. 110 Dykeman

The length of the training period, if completed, depends upon the apititude of the learner for the work, the average being seven or eight days. When the applicant files his written application for employment he states "It is agreed by me to serve for at least two weeks under the instructions of a conductor for the purpose of learning the duties and qualifying for such position, employment to be subject of (sic) passing required examinations on the operating rules, the working rules and regulations as from time to time applied, and the approval of the designated officer."

Exhibit No. 3, R. 114, Offered R. 27

The learners are not required to serve the whole two weeks if they can qualify sooner. As a matter of practice the period of training depends upon the capacity and aptitude of the individual trainee. R. 39, 42 Thomas R. 90 O'Neil R. 102 Quincy R. 110 Dykeman

While training, the learner is expected to be present with the crew to which he has been assigned during working hours, but he is not subject to the rules or discipline applicable to an employee and is not considered such. R. 39, 40, 42 Thomas R. 85-86 Haney R. 112 Dykeman

Prior to October 1, 1943, the persons in training received no allowance, regardless of whether they were accepted for employment; serving without compensation for the purpose of learning the business. R. 30 Thomas R. 106 Johnson

On October 1, 1943, the defendant and the Brotherhood of Railroad Trainmen changed the previous custom by a letter directed to the Chairman of the Brotherhood of Railroad Trainmen reading as follows: R. 30-33 Thomas

> "Effective October 1, 1943, and for the duration of the present Emergency, Student Brakeman, Road or Yard, will be made an allowance of $4.00 per day, for each calendar day, with a maximum number of ten days, irrespective of the hours devoted or the miles made on any day, the Student to devote not less than eight (8) hours each day to the service. Exhibit No. 7, R. 118, Offered R. 33
>
> "Payment to be made if and when Student has qualified, is accepted for and takes employment.
>
> "If this arrangement meets with your approval, will you please so acknowledge on the second copy of this letter, which is attached."

There is no evidence as to what the practice regarding compensation will be at the end of the war. The defendant appears to be under no obligation by virtue of any agreement to continue it beyond that point. R. 32 Thomas

Other than above mentioned the defendant does not pay learners the minimum wage provided by Sec. 6 of the Act nor does it maintain records of the kind required by Sec. 11 (c) covering the trainees.

Conclusion of Law.

For the purpose of decision it may be assumed that after the war defendant will revert to its former practice of paying trainees nothing for the training period and that it will continue as at present to pay nothing to those who do not complete the training.

On the issue presented the facts in the case do not differ in any material respect from those set forth in *Walling v. Jacksonville Terminal Co.*, 55 Fed. Supp. 302 (affirmed on appeal by the Circuit Court of Appeals in the Fifth Circuit April 23, 1945) and I follow that case and the reasoning of both courts in concluding that the trainee is not an employee under the commonly accepted meaning of the term nor as the term is used in the Act, it not being its purpose to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law.

I see no object in repeating or paraphrasing the reasoning in the above case, nor in Walling, Adm. v. Nashville, Chattanooga and St. Louis Ry., recently (May 22, 1945) decided the same way by the district court in the middle district of Tennessee; but, finding no violation of law and no reason to apprehend any, I conclude that the bill should be dismissed. Judgment will be entered accordingly.